THE "NEW BILL OF RIGHTS" AMENDMENT.

THE distinguished Senator from New York, James W. Wadsworth, Jr., and the able representative from Tennessee, Finis J. Garrett, believers in our "indestructible Federal union of indestructible States" have, respectively, introduced in the Senate as joint resolution No. 40 and in the House as joint resolution No. 69 the following proposed amendment to Article V of the Federal Constitution.

> "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes as part of this Constitution when ratified by three-fourths of the several States through their legislatures or conventions, as the one or the other mode of ratification may be proposed by the Congress or the convention: *Provided,* That the members of at least one house in each of the legislatures which may ratify shall be elected after such amendments have been proposed; that any State may require that ratification by its legislature be subject to confirmation by popular vote; and that, until three-fourths of the States have ratified or more than one-fourth of the States have rejected or defeated a proposed amendment, any State may change its vote: *And provided,* That no State, without its consent shall be deprived of its equal suffrage in the Senate."

The necessity for this proposal is in part political and in part legal. The political cause arises from the startling action by our "legislative amending agents" in ratifying the 18th and 19th Amendments. The legal cause arises from the holdings by the Supreme Court in the cases growing out of the ratification of these two amendments.[1]

These holdings seem to shift the source of political power from the "people of the several states" who ratified the Constitution, the only "people of the United States" known to our his-

[1] Hawke *v.* Smith, 253 U. S. 221; Leser *v.* Garnett, 42 Sup. Ct. 217.

tory, to their uncontrolled and unrestrained "amending agents". These "amending agents" under these decisions are constituted the ultimate sovereign power which formerly was supposed to reside only in the people themselves.

As Marshall said:[2]

> "The people made the Constitution, and the people can unmake it. It is the creature of their will. But this supreme and irresistible power to make or unmake, resides only in the whole body of the people; not in any subdivision of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated the power of repelling it" (i. e., the Courts).

This has unfortunately all gone by the board, and in its place a brand new theory of sovereignty in government has been set up. The passage of the Wadsworth-Garrett Amendment is now required to restore the sovereignty of the people.

Daniel Webster said:[3]

> "The sovereignty of government is an idea belonging to the other side of the Atlantic. No such thing is known in North America. Our governments are all limited. In Europe sovereignty is of feudal origin and imports no more than the state of the sovereign. It comprises his rights, duties, exemptions, prerogatives and powers. But with us all power is with the people and they erect what governments they please and confer on them such powers as they please. None of these governments are sovereign in the European sense of the word, all being restrained by written constitutions."

That can no longer be said since the holding that the people of Ohio could not, by provision of their State constitution, compel a referendum upon a proposed Federal amendment, but were bound by the action of their own agents in their legislature. Nor since the further holding that the legislatures of Tennessee, Missouri, Texas, West Virginia and Rhode Island were not bound by the provisions of their State constitutions forbidding them to ratify the 19th Amendment.

In other words it has, for the first time, been affirmatively

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[2] Cohens *v.* Va., 6 Wheat. 264, 389.

[3] CONGRESSIONAL DEBATES, Vol. IV, Part I, p. 565.

held that the "people of the several States" who ratified the Constitution, when directly submitted to them assembled in their State conventions, in fact transferred to their "amending agents" (that is to two-thirds of a quorem of Congress and a majority of thirty-six legislatures) a power supreme over themselves.

These "amending agents", without the semblance of a popular mandate, can, not only take away from the people of the States any inherent state-power, reserved to them by the 10th Amendment, as a condition of Federal union, and shift it to Congressional control; but they can embody in the Constitution itself an alleged moral commandment in main part beyond the reach of legislative modification by either Congress or State legislatures, after the fashion of the laws of the Medes and Persians, which alter not. A mere handful of legislators distributed among thirteen States—not more than about 200 men—can forever prevent repeal. This sets up an impossible irresponsible method for the exercise of legislative power which has no place in the democratic government of these United States.

In the political ratification of the 18th and 19th Amendments, the Congress passed the responsibility to the "State legislatures" refusing to submit them directly to the people of the States (who are the States) acting in State conventions as authorized by the Amending Clause itself.

The failure of Congress to invoke this form of popular referendum so as to obtain the sanction of the people themselves to these radical changes in the organic law is inexplicable.

Ratifiation by State conventions necessarily chosen *after proposal* would have made the issue direct and certain and the popular mandate complete.

In the debate in Congress (such as it was) upon proposing the 18th Amendment many members said they considered themselves bound to permit a vote upon ratification even if personally opposed to it. Strange, unless mere desire for haste was to control, that they did not make sure of popular approval by proposing to State conventions.

In very few, if any, legislatures was the question of fundamental policy in ceding "State Police-Power" to our Federal governmental agency adequately debated.

The original thirteen States had enjoyed the exclusive control of their "local police" for about three hundred years.

Even in legislatures where the 18th Amendment met with the strongest opposition the debate on fundamentals was meagre. Instance the absence of such debate in Louisiana with one majority in the Senate, in New York where a party caucus threw two deciding votes, in California and Maryland where the vote was close and even in New Jersey and Connecticut which rejected. The remarkable Rhode Island resolution instructing her Attorney-General to test the legal right of the legislatures of other States, by Federal Amendment, to take from her people, without their consent, control of their "local police" excited no serious comment in the press. When noticed at all it was called a desperate legal move on the part of liquor interests, a trifling way of disposing of the arguments of the Constitutionalists.

Many of the so-called "dry" States, either through various provisions permitting limited import for personal use or through lack of general enforcement, were not "dry" in fact. Yet their legislatures ratified after little or no debate. The Mississippi legislature ratified in both houses fifteen minutes after receiving the proposal. The local adoption by the people of these States of some form of State prohibition in order to abolish the saloon, was accepted as authority from them to their legislative amending agents

(1) to embody a "local police regulation" in form and effect irrepealable into the Federal Constitution.

(2) to legislate in this undemocratic form upon the local habits of people of other States, three thousand miles away, whom they did not know, had never seen and who could not hold them to political account—an absolutely irresponsible act.

(3) to surrender the local control of their own constituents, because forsooth they had already exercised their control locally, in a particular way suited to their own local conditions. Was there ever such an illogical *non sequitur?* Now, of consequence, their constituents are unable (except within very narrow limits and then only with the consent of Congress) to control its form, duration and extent. They no longer enjoy self-government. On the contrary Senators from Utah, Texas, Nebraska *et al.,* dic-

tate the dining tables of the citizens of Maryland, New York, Massachusetts and Rhode Island, interfere with their right to jury trial, and sometimes even invade their homes through minions sent from Washington.

Twelve State legislatures which were elected on other issues *before* the amendment was even proposed by Congress voted to ratify the 18th Amendment. They of course had no accurate means of determining the desires of their own people. But lack of a popular mandate did not give them pause. The people of California on referendum rejected State prohibition by a large majority at the same time they elected the legislature which undertook nevertheless to express "the assent of the people of California" to the 18th Amendment. In Maryland a legislature, elected on other issues before proposal, ratified in the face of a heavy majority against prohibition on referendum not long before. In Ohio the people, on referendum, repudiated their legislature's ratification of the 18th Amendment itself. The subsequent adverse Court ruling does not change that fact.

In the case of the 19th Amendment the lack of a popular mandate on the part of the "legislative amending agents" appears even more strikingly. The delightful theory was successfully advanced by both National Committee Chairmen that the women would vote solidly against that party whose legislatures refused to ratify; the absurd mythical sex-vote idea. Yet this produced about thirty specially called extra sessions to catch the women's vote. As a result thirty-four out of the thirty-eight legislatures which ratified the 19th Amendment were elected on other issues before submission by Congress with no popular mandate whatsoever. Five, namely the legislatures of Tennessee, Missouri, West Virginia, Texas and Rhode Island flatly ignored State constitutional provisions (under which constitutions they held their very existence) forbidding them to ratify. Thirteen legislatures ratified against the wishes of their own people expressed by unfavorable referenda on "State suffrage."

While the Supreme Court held in *Hawke* v. *Smith*[4] that the legislature "merely expresses the assent of its State" to a proposed amendment, the people, for whom it speaks and whose as-

[4] *Supra.*

sent it records, cannot limit their agent's power to ratify or even fix the time it shall vote thereon by provisions in their State constitutions (the instruments through which the people create the legislatures) expressly enacted for that very purpose. This seems to be the only case in the law where the agent becomes all powerful over his principal. And it ought to be changed forthwith.

Outside the ten States where the legislatures rejected and the two (Tennessee and West Virginia) which ratified by a majority of one in violation of State constitutional provisions, there was no constitutional discussion whatsoever. There was no debate over the policy of conferring new Federal power over suffrage nor of the dictation by distant States of the suffrage of the dissenting States. For the pleasure of meddling with the suffrage of Maryland, Delaware, Mississippi, Louisiana, *et al.*, the pacific coast States, whose women already voted, bound themselves in perpetuity never to disfranchise Chinese and Japanese women born in the United States.

The Maryland legislature passed a ringing resolution urging the other States to refrain from interfering with the suffrage of the people of Maryland under the guise of amending the Federal Constitution and challenging their power so to do. No newspaper in the United States published this resolution, only a very few mentioned it at all, and only one has been discovered which discussed it editorially.

The above should be sufficient to show the political and constitutional necessity of adopting the Wadsworth-Garrett Amendment if the "Home Rule", "Local self-government" principles of our strictly Federal union are to remain, and the establishment of the "Consolidated National-Government", which the fathers feared and we in our hearts fear just as much, is to be prevented.

A roll-call upon the proposal would accurately disclose how many friends of the American system of Constitutional Government remain in the Congress of the United States.

It can hardly be claimed even by the well organized minorities who stampeded through "State legislatures", uncontrolled by any constitutional restraints, and without popular sanction, two revolutionary Federal Amendments that therefore the same privilege must be accorded to all other well organized minori-

ties. To take that position would be to declare themselves enemies of the Federal Constitution and enemies of the American system. They will hardly dare assume that attitude nor will the members of Congress who supported those amendments care to record themselves as permanently opposed to "popular government" on constitutional questions.

An hundred million people scattered over a continent cannot be successfully governed in all their private intimate local affairs by an all-powerful legislative assembly at Washington. That would constitute the Consolidated-National-Government which the Federalists as well as the Democrats in the Constitutional Convention so vigorously opposed and thought they had forever guarded against.

The New-Nationalists seem to have in mind the fiction of a "mass people of the United States" which never had any existence in fact and which never acted directly or by representation.

There is no such political concept in this country as the people of the United States in the *aggregate.*

The people do not speak, never have spoken, and never can speak in their sovereign capacity, otherwise than as the people of the States.

The so-called "National" House of Representatives is elected every second year by *"the people of the several States".*[5]

There are but two modes of expressing their sovereign will known to the people of this country. One is by direct vote—the mode adopted by Rhode Island in 1788 when she rejected the Federal Constitution. The other is the method here generally pursued, of acting by means of conventions of delegates elected expressly as representatives of the sovereignty of the people.

Now, it is not a matter of opinion or theory or speculation, but a plain undeniable historical *fact,* that there never has been any act or expression of sovereignty in either of these modes by that imaginary community, "the people of the United States in the aggregate."

Usurpations of power by the *Government* of the United States there may have been and may be again, but there has never been either a sovereign convention or a direct vote of the whole peo-

[5] U. S. Const. Art. I, § 2; Hawke *v.* Smith, *supra,* 228.

ple of the United States in the aggregate to demonstrate its existence as a corporate unit or self-contained political sovereignty.

Every exercise of sovereignty by any of the people of this country that has actually taken place has been by the people of the States *as States.*

No respectable authority has ever had the hardihood to deny, that, before the adoption of the Federal Constitution the only sovereign political community was the people of each State.

When the Confederation was abandoned and the Constitution was adopted by the people of the several States in their State conventions the General Government was reorganized, its structure was changed, additional powers were conferred upon it, and thereby subtracted from the powers theretofore exercised by the State governments; but the seat of sovereignty—the source of all those delegated and dependent powers—was not disturbed. The only change was in the form, structure and relation of their governmental agencies.

There was a new *government,* but no new *"sovereign people"* was created or constituted.

The people, in whom alone sovereignty inheres, remained just as they had been before.

Madison said in the Virginia Ratification Convention:[6]

> "Who are parties to it? The people—but not the people *as composing one great body,* but the people as composing thirteen sovereignties."

Lee, of Westmoreland, said:[7]

> "If this were a consolidated government ought it not to be ratified by a majority of the people as *individuals* and not as States?"

Charles Pinckney, in the South Carolina Convention, said:[8]

> "With us the sovereignty of the *Union* is in the *people.*"

In *McCulloch* v. *Maryland,*[9] Marshall said for the Supreme Court:

> "They (the people) acted upon it in the only manner in which

[6] 3 ELL. DEB. 94.
[7] 3 ELL. DEB. 180.
[8] 4 ELL. DEB. 328.
[9] 4 Wheat. 316, 402.

> they can act safely, effectively and wisely on such a subject, by assembling in convention. It is true they assembled in their several States—and where else should they have assembled?"

Then, answering his own question, he conclusively disposes of any idea of a "mass of people of the United States", in these words:

> "No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States."

Of course it may be denied that there were no such political dreamers then or are not now. But, after all these years, does anyone expect a new ultimate sovereign people—a mass people of America—different from and superior to the "people of the States" who ratified the Constitution, to be now discovered?

Or that the primary sanction upon which Marshall based the very supremacy of delegated Federal power, the action of the people of the States in ratifying the Constitution, has now been broken down?

While the Supreme Court in the recent cases, it is true, held that the "amending agents" acted without constitutional restraint nevertheless they set up no "mass people." On the contrary they still held that the "legislature" was designated as the agency to express "the assent of its State" to a proposed amendment.

What is needed is to so far impose restraint upon these "legislative amending agents" as to compel them to truly represent their people and record a real assent after popular sanction. This the Wadsworth-Garrett Amendment accomplishes.

If the New Nationalists who seem to visualize this mythical mass people as a basis of their political philosophy now wish to establish such "mass people" and bring them into power, they will have to find some other basis for their political action to operate. It cannot reasonably operate to pass irrepealable local legislation for all of us and hamstring our democracy by so-called moral commandments in form and effect irrepealable through the Amending Clause of the Constitution. This clause

was designed only for perfecting and improving our Federal "Home Rule"—"Local self-government" scheme of government, and for shifting "governmental legislative powers" between our State and Federal legislative agencies.

Its proper use necessarily always preserves to the people their inherent right to repeal or modify the laws under which they must live through representative legislative bodies directly responsible to them.

It was never intended to affirmatively legislate by the Amending Clause itself or to force such legislation by means of it (repealable by no democratic process) upon unwilling sections.

Such use of the Amending Clause destroys "representative government" by taking from the people acting through their responsible legislative agencies (Congress and State Legislatures) the power to repeal or modify.

In *Rhode Island* v. *Palmer,*[10] finding No. 6 reads:

> "The first section of the Amendment—the one embodying the prohibition—* * * of its own force invalidates every legislative act—whether by Congress, by a State legislature, or by a territorial assembly—which authorizes or sanctions what the section prohibits."

Such use of the Amending Clause clearly lacks all democratic sanction, is in its very nature unrepresentative, and may accurately be called "irresponsible government by constitutional amendment."

It is no substitute for popular sovereignty under the Constitution. It will destroy the Constitution without substituting any democratic form which responds to the desires of the people and accurately records their legislative will.

It ties a great democracy in a political straight-jacket and therefore foments revolutionary ideas.

The Wadsworth-Garrett Amendment prevents its use for any purpose for which there is not a clear and unmistakable popular mandate.

Whether we are Democrats or Republicans, Federalists, States Rights' men or New Nationalists, Prohibitionists or Suffragists

[10] 253 U. S. 350, 386.

or Anties we should all desire political action to express only the will of the people and be free from dictation by well organized minorities. We should all desire "legislative action" which is repealable in response to popular desire and not written like a a religious truth in unchanging tables of stone. So believing, we should all pull together for the proposal and ratification of the Wadsworth-Garrett Amendment.

George Stewart Brown.

BROOKLYN, N. Y.